Supreme Court, U. S.
FILED
OCT 2 1978

In the

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-58

G. GARVIN BROWN, III, Petitioner

v.

MARK PAUL FELSEN, Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ALEX STEPHEN KELLER
Keller, Dunievitz & Johnson
950 - 17th Street, #1650
Denver, Colorado 80202

COUNSEL FOR RESPONDENT

September 28, 1978

INDEX

	Page
STATEMENT OF THE CASE	1
REASONS FOR NOT GRANTING THE WRIT	3
CONCLUSION	8

CITATIONS

CASES:

In re Houtman, 568 F. 2d 651 (9th Cir. 1978)	4
In re McMillan, 2 Bankr. L. Rep. (CCH) §66,883 (3rd Cir. 1978)	4
In re Nicholas, 510 F. 2d 160 (10th Cir.) *cert. denied,* 421 U.S. 1012 (1975)	3, 5, 6
In re Pigge, 539 F. 2d 369 (4th Cir. 1976)	3, 4
Morrison v. Goodspeed, 100 Colo. 470, 68 P. 2d 458	3
Schwartz v. Blue, ... Colo. App. ..... 573 P. 2d 941 (1977)	

MISCELLANEOUS:

46 Am. Jur. 2d 837, Judgments, §686	5
46 Am. Jur. 2d 840, Judgments, §688	5
Rule 9(b), Colorado Rules of Civil Procedure	3

In the

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-58

G. GARVIN BROWN, III, Petitioner
v.
MARK PAUL FELSEN, Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The respondent Mark Paul Felsen respectfully prays that the Petition for a writ of certiorari filed by the petitioner herein be denied. As grounds therefor, respondent states as follows:

With reference to the Petition, the statements regarding the Opinion Below, jurisdiction questions presented, statutory provisions involved, and the accuracy of the appendices attached to the Petition, are conceded.

STATEMENT OF THE CASE

The petitioner's Statement of the Case is generally accurate, but we wish to point out certain specific additional items:

The bank commenced an action on June 19, 1975 against LeMans Motors, Inc., a Colorado corporation, Mark Felsen, and G. Garvin Brown, III, in the District Court

for the County of Jefferson, State of Colorado. The corporation and Felsen answered and Brown answered. In paragraph 3 of the affirmative defenses in Brown's answer appears the statement quoted on page 5 of the Petition. Brown filed an amended answer in which he incorporated his previous answer, including the above quoted language from paragraph 3 of the affirmative defenses of his original answer.

Brown also filed a cross-claim against the corporation and Felsen, quoted as follows:

"FIRST CROSS-CLAIM

"1. Any liability which this Defendant purportedly has to Plaintiff arises out of a guaranty executed by this Defendant on behalf of LeMans Motors, Inc. and Mark Felsen.

"2. If judgment is had against this Defendant by Plaintiff, then this Defendant is entitled to be indemnified by LeMans Motors, Inc. and Mark Felsen for the full amount of said judgment, plus this Defendant's costs and expenses."

Following discovery, motions for summary judgment, pre-trial statements and a trial setting, a stipulation was executed by the parties, through counsel, that judgment would enter on plaintiff's complaint (founded entirely on the promissory note and a guaranty), and judgment would enter in favor of Brown on his cross-claim (quoted above) against the corporation and Felsen. That stipulation was reduced to judgment and no evidentiary hearing was had before the Trial Court. Judgment entered in December, 1975.

The Petition asserts on page 5 that the issue of fraud, while concededly not pleaded in Brown's cross-claim, was raised on the face of the answer. The Petition further asserts on page 5 that the State Court record contains clear and unequivocal allegations of fraud.

Respondent differs with this characterization because Rule 9(b) of the Colorado Rules of Civil Procedure provides as follows:

> "(b) *Fraud, Mistake, Condition of the Mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Colorado's leading case on fraud is *Morrison v. Goodspeed,* 100 Colo. 470, 68 P. 2d 458. This case specifically sets forth the requirements for the pleading and proof of fraud. Considering the rule and the above cited case, the State Court record does not rise to any sort of pleading of fraud. It doesn't even state the defendant against whom the allegation is directed. In the Opinion Below the Court refers to this question (Petition, App. 9) as a "casual answer."

The Petition then alleges that the deposition of the respondent is "riddled with admissions of fraud." Respondent disagrees.

On page 7 of the Petition it is stated that the Bankruptcy Court granted the motion for summary judgment on the grounds of *res judicata.* The opinion of the Bankruptcy Court does not specifically so state but simply relies on a controlling case from the United States Court of Appeals for the Tenth Circuit.

REASONS FOR NOT GRANTING THE WRIT

We now wish to discuss, in the same order as the Petition, petitioner's reasons for granting the writ:

A. Counsel relies on *In re Pigge,* 539 F. 2d 369 (1976). This case was decided June 11, 1976 (after the case upon which the Bankruptcy Court relied from the Tenth Circuit).

The Bankruptcy Court and the District Court in the case at Bar relied on *In re Nicholas,* 510 F. 2d 160 (10th Cir.), *cert. denied,* 421 U.S. 1012 (1975).

In Pigge (supra), from the Fourth Circuit, there was a state court judgment on contract, and the Bankruptcy Court and the District Court agreed with the bankrupt that the creditor had no right to offer extrinsic evidence to prove non-dischargeability. Pigge appears to be contrary to Nicholas (supra), but it is interesting to note that it doesn't cite it.

On page 10 of the Petition, petitioner complains that the Tenth Circuit made no attempt to reconcile its interpretation with Pigge, (supra). How could it, when Pigge was decided later?

On page 11 counsel then cites a 1964 case from the Ninth Circuit which is of little value because the case was decided prior to the 1970 amendments to the statute. Petitioner cites *In re Houtman,* 568 F. 2d 651 (1978), from the Ninth Circuit, but Houtman is totally different in the facts because in that case in a jury trial before the state court, the creditor's claim for fraud was sustained. The Bankruptcy Court held the debt dischargeable. The lower court was affirmed and the Ninth Circuit held that a state court judgment, based on fraud, is sufficient to establish a prima facie case that the debt is non-dischargeable but that the bankrupt is entitled to rebut this prima facie case.

The Petition then cites Third and Second Circuit cases prior to 1970, which respondent does not believe are applicable since they were decided before the 1970 amendments.

Petitioner asserts that the Tenth Circuit's determination "squarely collides" with other circuits, but this is not correct when taken in proper context and considering the dates of the decisions. It conflicts only with the Fourth Circuit. Notably in the Tenth Circuit case, a petition for writ of certiorari was denied.

B. Petitioner filed a supplemental memorandum referring to *In re McMillan,* (1978) 2 Bankr. L. Rep. (CCH)

§66,883 (3rd Cir., filed June 21, 1978). Respondent believes this case supports his position. In that case the creditor filed a complaint based on fraud in the State Court and obtained a judgment by default. The Bankruptcy Court, asked to rely on the State Court judgment, ruled the debt dischargeable. The District Court affirmed. The Third Circuit affirmed. In the opinion it is stated that the creditor did not adequately plead fraud. The Court further stated that as between parties and their privies an issue need and should be judicially determined only once. The Court relied heavily on the fact that in a default judgment the issue was not actually litigated and thus the doctrine of *res judicata* or collateral estoppel does not come into full play. The Court undoubtedly had in mind the fact that judgments by default are subject to different rules than other judgments. They are liberally opened, corrected or vacted, and descretion is usually exercised in favor of granting such applications. These rules are fundamental and are generally discussed at 46 Am. Jur. 2d 837, Judgments, §686.

In the case at Bar, after the case had already been set for trial, a judgment by consent was entered. The matter was in fact litigated for many months although no trial was held. A judgment by consent is in an entirely different category than a judgment by default and has the same effect as a judgment after a trial on the merits. This fundamental rule is discussed generally in 46 Am. Jur. 2d 840, Judgments, §688.

C. Beginning on page 12, the Petition discusses significant practical problems. In order to discuss this in its proper context, the logic of In re Nicholas (supra) should be examined. In that case the creditor had obtained a judgment by default in a state court in New Mexico. The state judgment was based entirely on contract. The Bankruptcy Court granted summary judgment to the bankrupt holding that the State Court judgment, being based only on contract,

cannot be reexamined. It held that in view of the complete record made before the State Court, there was no need to resort to extrinsic evidence to ascertain the nature of the underlying debt.

The Trial Court indicated that if there were any ambiguity or doubt as to the State Court proceeding, resort could be had to extrinsic evidence. Purely and simply, the Tenth Circuit stated unequivocally that when a creditor relies totally on a contractual theory in the State Court and then finds that his judgment may not be collectible because the debtor filed a petition in bankruptcy, he cannot be permitted as an afterthought to change his claim to fraud. This conclusion is absolutely logical and results in the reduction of litigation in the Federal Court system.

Congress provided people in great financial difficulty a remedy under which they can get a fresh start. Ordinarily, the bankrupt's position is favored. Why should there be an exception in cases where the state courts have already acted and where a creditor did not even raise fraud in the state court? Why should a creditor be allowed to continue to harass a debtor and make him incur additional attorney's fees and costs to again defend himself in the Bankruptcy Court on a claim already adjudicated in the state court?

In the case of In re Nicholas, the Bankruptcy Court did not only examine the judgment but the entire record, as in the case at Bar. The Tenth Circuit did not hold that resort can never be had to extrinsic evidence. It merely held that when a state court record is crystal clear in its entirety, a creditor should not be allowed to have a second bite.

The Petition complains bitterly that creditors holding commercial paper must alter their ways to pursue collection and must pursue their fraud remedies in the state court. Not at all. First of all, the bankruptcy statute is not

designed to aid commercial creditors but is designed to aid the bankrupt. Secondly, if the commercial creditor in truth has a valid claim for fraud in the state court, he should litigate it. If it is properly pleaded and determined in the creditor's favor, he will have a great advantage in the Bankruptcy Court although, as previously stated, the bankrupt may rebut the prima facie record.

Why in the world would a commercial creditor file simply a complaint or cross-claim on contract or indemnity, when in fact his claim is one for fraud? Perhaps commercial creditors do not wish to go to the expense of proving fraud, but if in fact it clearly exists why should the burden of doing so be removed?

On page 15 of the Petition reference is made to a "wily defendant." This reference is entirely speculative and there is not one shred of evidence in the case at Bar that the respondent intended or contemplated the filing of a petition in bankruptcy during the state court litigation. Throughout the state proceedings petitioner was represented by highly competent counsel and was perfectly at liberty to follow the Colorado law by properly pleading fraud and proving it.

The benefit to a commercial creditor to obtain a judgment based on fraud in the state court not only relates to a possible future bankruptcy but can have other results, such as punitive damages and body execution.

Counsel cites *Schwartz v. Blue,* ..... Colo. App. , 573 P. 2d 941 (1977). This case simply holds that the final jurisdiction to determine dischargeability lies in the Bankruptcy Court. This case can be of no comfort to petitioner.

On page 18 of the Petition, petitioner states that a creditor is denied the opportunity to have the true nature of the obligation determined. For the reasons above stated, this is totally incorrect. The Petition also claims that the practice of limiting a suit on commercial paper to breach of contract, even though a fraud claim may be available, is

widespread. Respondent disagrees. On the contrary, if a creditor has a bona fide clear claim for fraud, it is almost always presented to the state court because of the basic principle that not only matters which are actually pleaded, but also those which could have been pleaded, are subject to the rule of *res judicata*.

D. The failure of the Bankruptcy Court to examine respondent's deposition has in general already been dealt with. First of all, respondent contends that even if they had, it would be of no comfort. Secondly, in the case at Bar there was a stipulation before the Bankruptcy Court as to the record in the State Court, and this stipulation is binding on the petitioner (Pet. App. 5).

CONCLUSION

For the reasons above stated, the Petition for writ of certiorari should be denied.

Respectfully submitted,

ALEX STEPHEN KELLER
Keller, Dunievitz & Johnson
950 - 17th Street, #1650
Denver, Colorado 80202

COUNSEL FOR RESPONDENT

September 28, 1978